



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No. J1500/20

In the matter between:

ELMARIE STYEN

Plaintiff

and

BUSINESS CONNEXION GROUP LIMITED

Defendant

Heard: 3 – 5 February 2025

Delivered: 7 February 2025

JUDGMENT

MAKHURA, J

‘... when one talks about the concept of reaching an agreed retirement age, one is talking about a point at which it has been agreed that an employee will retire or will be retired or must leave his or her job and cease working.’¹

[1] The crux of the dispute before this Court is whether the plaintiff had reached the retirement age, at which stage, she was required to cease working for the defendant, Business Connexion Group (Pty) Ltd (BCX). The plaintiff claims that she had not reached the retirement age and therefore the decision to retire or dismiss her on 4 September 2020, three months after she reached 60 years, is automatically unfair in terms of section 187(1)(f) of the Labour Relations Act² (LRA). In defence, BCX invoked section 187(2) of the LRA and contended that the plaintiff’s dismissal is fair on account that she had reached the agreed retirement age. The plaintiff disputes the agreement.

[2] Section 187(1)(f) provides that:

‘A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is

...

(f) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.’

[3] Section 187(2) provides that:

‘Despite subsection (1) (f) –

...

(b) a *dismissal* based on age is fair if the *employee* has reached the normal or agreed retirement age for persons employed in that capacity.’

¹ Zondo CJ in *Motor Industry Staff Association and Another v Great South Autobody t/a Great South Panelbeaters; Solidarity obo Strydom and Others v State Information Technology Agency SOC Ltd* [2024] ZACC 29 (*Landman*) at para 49.

² Act 66 of 1995, as amended.

[4] The facts of this case are not controversial. The plaintiff was employed by UCS Solutions (Pty) Ltd (UCS) as a Programme Manager – SAP. In terms of this employment contract, her retirement age was 60 years.

[5] On 1 April 2018, UCS was transferred to BCX, the defendant in this matter, in terms of section 197 of the LRA. Two other companies were transferred at the same time with UCS to BCX. UCS and these two other companies were all subsidiary companies of BCX.

[6] Subsequently, BCX presented a contract of employment to the plaintiff for signature. The plaintiff refused to sign the contract citing the onerous restraint of trade clause and allegedly the retirement age of 60 years. There is a dispute whether the plaintiff raised a query relating to the 60 years retirement age in the contract. Considering that this was a transfer as a going concern and that the plaintiff's retirement age with UCS (old employer) was 60 years, nothing significant turns on this disputed fact.

[7] The retirement age of these subsidiaries varied between 60 and 65 years. UCS had a retirement age of 60 years and so the plaintiff's retirement age at the time of transfer of UCS to BCX was 60 years. At least one subsidiary had a retirement age of 65 years. BCX's retirement age was 60 years. BCX informed the employees, including the plaintiff, that it intended to harmonise all its employees' employment contracts so that they enjoy the same or similar terms and conditions of employment and benefits. This harmonisation process entailed, *inter alia*, that those employees from the subsidiaries whose retirement age was 60 years and the employees of BCX before the transfer would be transitioned to 65 years. This was also in line with the retirement age of the Telkom Group, which is the 100% shareholder of BCX. No time period was identified or set regarding the commencement and/or finalisation of this harmonisation process. The plaintiff's evidence was that subsequent to the transfer, she continued to work as normal.

[8] The plaintiff reached 60 years on 6 June 2020. Prior thereto, the plaintiff received an email from the defendant notifying her of her retirement funds benefits.

[9] On 9 July 2020, the plaintiff wrote a WhatsApp message to BCX's Danielle Thompson (Thompson). She stated that she wanted to understand from Thompson what a "PC contract" meant and that she "*thought that BCX now has a retirement age of 65?*". In response, Thompson wrote:

'No, retirement age for 65 is only for staff who are employed under the new terms and conditions. Not all staff have moved across to this.'

[10] The plaintiff then enquired if she could not be moved across, to which Thompson indicated that she could not and that she had already enquired about same. The undisputed facts are that on the same day, 9 July 2020, BCX offered the plaintiff a fixed term contract of employment. The plaintiff responded to the offer on 21 July 2020. She said:

'As a permanent employee of BCX, I have an expectation of continued employment. This means for me that I will not be considering contracts offered that will limit my employment conditions.'

[11] The offer as presented to the plaintiff was rejected and this was confirmed by BCX on 19 August 2020. On 25 August 2020, the plaintiff addressed the following email to BCX:

'Just to be specific to what I have said – I have reiterated that I am permanently employed. If BCX chooses to change or restrict my employment conditions offering me a limited time contract I won't be considering ... such.

I suggested if keeping me permanently employed is not acceptable – that we perhaps consider a mutually agreed separation agreement.'

[12] The plaintiff's employment was then subsequently terminated with her last day of work being 4 September 2020. She referred an unfair dismissal dispute to the

Commission for Conciliation, Mediation and Arbitration (CCMA). After the non-resolution of the dispute during conciliation at the CCMA, the dispute was referred to this Court for adjudication.

[13] The plaintiff pleaded that she did not reach the normal retirement age because there is no normal retirement age for persons employed in her capacity and that “*she was the only person employed in that capacity*”. There is no dispute on this aspect as the case does not concern the normal retirement age.

[14] The plaintiff pleaded that there was no agreed retirement age between her and BCX. This is how she pleaded her case:

‘The term “agreed retirement age”, properly interpreted, means such retirement age as a relevant employee has actually agreed with the employer seeking to dismiss her, and excludes any retirement age agreed with a different employer, that is deemed to apply to a new employer pursuant to the transfer of a business as envisaged in section 197.

Before [she] was transferred to the [defendant] pursuant to section 197, her agreed retirement age was 60.

At that time her retirement age was consistent with, and equal to, that of other employees by UCS, and thus fundamentally fair.

At the time of [her] dismissal, the retirement age of BCX employees other than those whose employment contracts were transferred from UCS to the [defendant], was 65 years.

In the result [her] terms of employment would be discriminatory, and therefore on the whole less favourable to her than the inherently consistent terms of which she had been employed by the old employer as envisaged in section 197...

Therefore, by requiring the [plaintiff] to be employed subject to a retirement age of, and retire at 60 years, the [defendant] did not comply with section 197.

Moreover, such an interpretation would not fulfil the purpose of section 197 of protecting an employee against unfair loss of her job, as occurred in the case of the [plaintiff].

The [plaintiff's] retirement age, as the [defendant] sought to apply it, was thus unfair, inconsistent and calculated to result in her unfair dismissal.

In the premises the [defendant] was not entitled to invoke the exception created by section 187(2)(b), as the [plaintiff] had not reached the agreed retirement age envisaged in that sub-section as properly interpreted with due regard to the right to fair labour practices and the right to equality enshrined in sections 23 and 9, read with section 39, of the Constitution.'

[15] The most fundamental aspect of the plaintiff's case is that the transfer of UCS to BCX in terms of section 197 of the LRA, which took effect on 1 April 2018, did not amount to a transfer of her condition of retirement age which she agreed with UCS. Section 197(2) and (3) of the LRA provides:

'(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

(3)(a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.'

[16] Mr Rautenbach, appearing for the plaintiff, in line with the pleaded case, submitted that the plaintiff cannot rely on section 187(2) of the LRA because there was no agreed retirement age between the plaintiff and BCX. He submitted that the agreed retirement age envisaged in the section excludes any retirement age agreed between the plaintiff and UCS, the old employer whose business was transferred to BCX. Inexplicably, the plaintiff concedes that all the other terms and conditions of the contract of employment were transferred from UCS to BCX.

[17] This is a fanciful and fallacious argument. The purpose of section 197 was articulated by the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town and others*³ as two-fold - to facilitate the commercial transactions while at the same time protecting the workers against unfair job losses. On the consequences of a transfer in terms of section 197, the Constitutional Court said that:

'Subsection (2) tells us the consequences that flow from a transfer of a business as a going concern as contemplated in subsection (1). It refers back to subsection (1), which envisages two categories of transfer: one from a solvent employer and the other, broadly speaking, from an insolvent employer. In both instances, the transfer of the business as a going concern results in the transfer of the workers to the new business. The section makes a distinction between contracts of employment, on the one hand, and rights and obligations that flow from such contracts on the other. 'All the rights and obligations' must include all the terms and conditions of the contracts of employment. It therefore does not matter, from a practical point of view, that subsection (2)(a) does not explicitly provide for the transfer of contracts of employment. The section is premised on the continuity of employment of the workers which is not interrupted by the transfer contemplated in subsection (1). 'That employment', subsection (4) says, 'continues with the new employer as if with the old employer'.⁴ [Own emphasis]

³ 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 (CC).

⁴ Ibid at para 63.

[18] From the above, the interpretation that Mr Rautenbach sought to give to the phrase “*agreed retirement age*” in the context of a transfer of a business as a going concern is untenable and legally unsound. The Constitutional Court has expressly said that it is all the terms and conditions of the contract that are transferred. BCX, as the new employer, was automatically substituted in the place of UCS, the old employer, in respect of all contracts of employment in existence immediately before the date of transfer.

[19] It is common cause that BCX presented a new contract of employment to the plaintiff for her signature. The plaintiff refused to sign the contract of employment and did not take up the opportunity to negotiate a variation of the 60 years retirement age. The plaintiff’s refusal to sign the contract did not change the fact that there was a transfer of business from UCS to BCX in terms of section 197 and also did not change the legal position that all her terms and conditions with UCS were transferred to BCX. However, it would appear that the plaintiff has considered her refusal to be significant because whilst she accepts that there was an agreed retirement age of 60 years with UCS, she contends that there was no such age retirement agreement concluded with BCX. The High Court has answered the plaintiff’s misapprehension of her transfer in *Experian South Africa (Pty) Ltd v Haynes and another*⁵ as follows:

‘The intention of s 197(2), undoubtedly, is that in the absence of agreement between the new employer and employee, no greater or lesser reciprocal rights and obligations can be imposed or conferred upon the employee and the new employer. In a unanimous judgment, the full court per Froneman J (as he then was) in *Securicor (SA) (Pty) Ltd and Others v Lotter and Others* 2005 (5) SA 540 (E) in para 10 held:

“Section 197 of the Labour Relations Act makes inroads on the common-law principle that a contract of employment may not be transferred without the consent of the employee, but it does not, in my view, confer any greater or lesser reciprocal rights and obligations upon either the employee or new employer than

⁵ 2013 (1) SA 135 (GSJ); (2013) 34 ILJ 529 (GSJ).

that which existed between the employee and the old employer... (I)ts provisions are aimed at facilitating commercial transactions on the one hand while at the same time protecting workers against unfair job losses. Its effect is that 'the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment'; that the rights and obligations between the old employer and the worker are transferred to the new owner; that the transfer does not interrupt the continuity of employment; and that the employment contract 'continues with the new employer as if with the old employer'. Put another way, its effect is not upon the content of the rights and obligations existing at the time of transfer of a business, but on the identity of the person or legal entity against whom the rights may be enforced and to whom the obligations are now owed.⁶

[20] The transfer of UCS to BCX as a going concern in terms of section 197 is not in dispute. The transfer was never challenged when it took effect and thereafter. The plaintiff does not seek to challenge the transfer in these proceedings and has not pleaded that her dismissal was automatically unfair because of a transfer or reason contemplated in section 197⁷.

[21] In the absence of an agreement between the employee and the new employer, all the rights and obligations are transferred to the new employer as they are – *voetstoots*. Flowing from the above, there can only be one conclusion, which is that all the rights and obligations that existed between the plaintiff and UCS at the time of the transfer, including the retirement age of 60 years, were transferred to BCX. Therefore, the agreed retirement age of 60 years between the plaintiff and UCS was transferred as well. The only thing that changed after the transfer of UCS is the name or identity of the employer – all other terms and conditions and benefits remained unchanged. To the extent that the plaintiff argues that her retirement age changed, that change should have been reduced to writing and signed by both parties, as per the non-variation

⁶ Ibid at para 28.

⁷ See: section 187(1)(g), which provides that “a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is a transfer, or a reason related to a transfer, contemplated in section 197 or 197A”.

clause contained in the plaintiff's contract of employment or letter of appointment which was transferred to BCX.

[22] The promise by BCX that the plaintiff would transition to 65 years retirement age does not amount to an amendment of a term and condition of the contract, and does not assist the plaintiff. It remained that – a promise. There was no deadline for this intended transition or harmonisation. At the time of the plaintiff's dismissal, BCX had only started the harmonisation process with the newly appointed employees and those who accepted alternative employment pursuant to a retrenchment process. Mr Rautenbach's argument that BCX should have transitioned employees who were close to retirement is not part of the pleaded case and was not part of the plaintiff's evidence.

[23] Accordingly, the plaintiff and BCX had an existing agreed retirement age of 60 years. There is no shred of evidence to suggest that this agreement was at any stage amended or varied. The plaintiff had already reached the agreed retirement age of 60 years at the time when she was dismissed or retired. BCX was therefore entitled to invoke section 187(2) of the LRA. The successful invocation of section 187(2) marks the end of the enquiry and the case for the plaintiff. All other arguments relate to an enquiry into the cause of the discrimination and are therefore irrelevant and moot.

[24] I however consider it important to address some of the plaintiff's contentions. The plaintiff has pleaded that her terms of employment with BCX were discriminatory and *"on the whole less favourable to her than the inherently consistent terms on which she had been employed by the old employer as envisaged in section 197, namely UCS"*, which is an attempt to ground a claim in terms of section 187(1)(g) of the LRA. She pleaded that she was discriminated against because she was transferred on the terms and conditions that were on the whole less favourable to the BCX employees, who, according to her, were on 65 years retirement age. This claim was defeated during cross-examination she could not dispute that the BCX employees' retirement age, which she sought to compare herself with, was 60 years.

[25] That case was then developed further by Mr Rautenbach during arguments as follows – the plaintiff was discriminated against because she was transferred on less favourable terms compared to the employees who were transferred from other subsidiaries whose retirement age at the time of transfer was 65 years. This is not a pleaded case.

[26] Whether the BCX employees and other employees from the subsidiaries were on 65 years agreed retirement age does not assist the plaintiff. That differentiation would have been rational and justifiable. This Court has already pronounced on a similar matter in *Wanless v Fidelity (Pty) Ltd*⁸. The Court held that:

‘Insofar as the differentiation was between Mrs Wanless and other Fidelity employees, there was a rational basis for differentiation between former Supercare and Fidelity employees. Each group came with different conditions of employment. In some respects Supercare employees were employed on better terms ... Section 197 of the LRA required Fidelity to abide by the Supercare contracts of employment. Likewise, s 64(4) of the LRA prohibited Fidelity from unilaterally changing terms and conditions of service of Supercare employees.’

[27] The plaintiff fundamentally misconstrued section 197(3)(a). This section relates to the terms and conditions of employment between the old and the new employer, not the old employer and some other employer nor does it relate to a comparison between the old employer and the employees within the new employer. That enquiry is limited only to the rights and obligations between the employees and the old employer and the rights and obligations with the new employer at the time of the transfer. Further, to the extent that the plaintiff’s complaint was that she was treated differently, her remedy was to either lodge a grievance with BCX and/or refer a dispute about an unfair labour practice relating to the provision of benefit in terms of section 186(2) of the LRA.

[28] During evidence, the plaintiff complained that she was dismissed on four days’ notice and without consultation, the Constitutional Court in *Landman* said that:

⁸ (2008) 29 ILJ 2030 (LC) at para 29.

'If there is an agreed retirement age and the employer dismisses the employee upon the latter reaching the agreed retirement age, section 187(2)(b) of the LRA applies and the dismissal is fair. There is also no obligation on the employer to afford the employee procedural fairness in such a case because the parties agreed that the employee's contract of employment would be terminated upon him or her reaching the agreed retirement age. The employer's decision in such a case does not adversely affect any of the employee's rights because the employee has previously agreed that, when he or she reaches that age, the employer may dismiss him or her.'⁹

[29] The plaintiff's claim is stillborn and falls to be dismissed. BCX sought a costs order against the plaintiff. The plaintiff had claimed in her emails before she was retired that she was permanently employed and that her retirement age was 65 years. She knew that her retirement age was 60 years and that this was never amended. Instead, she brought an automatically unfair dismissal claim based on discrimination on the ground that her retirement age was not 60 years and that she did not agree to a retirement age with BCX. This, on the face of a transfer in terms of section 197 and a common cause fact that her agreed retirement age with UCS was 60 years.

[30] During her evidence, she sought to rely on BCX's intended harmonisation to establish that her retirement was not 60 years. In arguments, she submitted that there was no reason why BCX could not transition those employees who were close to retirement – a case of course which was not pleaded. The plaintiff's case was in my view made up as the trial proceeded.

[31] On 9 July 2020, the plaintiff, in her query to human resources, said that she "thought" that BCX had a retirement age of 65 years. This was clarified to her that this only applied to the employees appointed in terms of the new terms and conditions. It is inexplicable that she brought this claim in essence suggesting that her retirement age was 65 years.

⁹ *Landman* at para 57.

[32] The plaintiff's interpretation of the phrase "*agreed retirement age*" in section 187(2) in the context of the transfer of business as a going concern is wild and untenable. This, on the face of the Constitutional Court's comprehensive analysis of the purpose of section 197.

[33] BCX was accused of discrimination. Discrimination is a serious issue, which could have serious negative and irreparable consequences on an employee or an employer. Those who make unfounded and baseless accusations of discrimination must face the same treatment as those who practise it. Discrimination cases in the workplace must be viewed from the lenses of both the employers and employees. The same energy used to condemn employers for having discriminatory practices should equally be used to condemn employees who make unfounded and wild allegations of discrimination against their employers. Employees who make these allegations do so at their own peril.

[34] In my view, the law and fairness dictate that this is a matter that warrants a costs order being granted, regardless of the outcome. The defendant was entitled to defend the claim and should not be saddled with the costs of defending a meritless claim of this nature. The plaintiff, as the unsuccessful party, must pay the costs of BCX.

[35] In the premises, the following order is made:

Order

1. The plaintiff's claim is dismissed with costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff: Mr F. Rautenbach

Instructed by: Carelse Kahn Inc t/a CK Attorneys

For the Defendant: Mr D. Pretorius of Fluxmans Incorporated

LABOUR COURT